United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Signed

75-1244

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

NICHOLAS L. BIANCO,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the evidence was sufficient to sustain the verdict. (Appellant's Issues I and III.)

2. Whether it was error for the trial court to admit evidence of prior nonfiling of tax returns as proof that appellant did not accumulate assets in those years. (Appellant's Issue II.)

3. Whether evidence obtained through use of a mail cover and introduced at trial without objection can now serve as a basis for reversal of appellant's conviction. (Appellant's Issue IV.)

4. Whether the trial court's finding that the Government had met its burden of demonstrating that its case was not derived from immunized testimony was clearly erroneous. (Appellant's Issue V.)

STATEMENT OF THE CASE

On April 30, 1975, following a jury trial in the United States District Court for the Eastern District of New York (Honorable Thomas C. Platt presiding), appellant was convicted on five counts of failing to file income tax returns for the years 1967 through 1971.[1/] On June 20, 1975, appellant was sentenced to consecutive terms of one-year imprisonment on each of the five counts with the execution of the sentence on count five being suspended and appellant placed on probation for five years following completion of the sentences on counts one through four. In addition, appellant was fined $10,000 on each count. Notice of appeal was filed on the same day. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

The evidence in support of the verdict may be summarized as follows:

The Government, utilizing the cash expenditures method of proof, showed that appellant, having not filed tax returns for the five prosecution years, had the following adjusted gross income and resulting tax due for those years:

1/ Section 7203 of the Internal Revenue Code of 1954 (26 U.S.C.).

Year	Adjusted Gross Income	Tax Due
1967	$4,284.68	$547.00
1968	$5,924.99	$564.10
1969	$6,898.25	$757.60
1970	$8,916.49	$932.42
1971	$10,217.01	$1,035.87

These figures were computed from proven expenditures made by appellant for such things as automobile payments, apartment rental, payments for utilities, insurance, doctor's and hospital bills, and Bureau of Labor Statistics estimates of his food, clothing and personal care expenses. (A. 488a-469a.)[2/] In addition, Miss Shayne Peters, appellant's former girlfriend, testified that during the first eight months of 1967, appellant wined and dined her at a number of fashionable night clubs on no less than 46 different occasions. (A. 346a-370a.) No estimate was given as to the cost of these outings, but appellant was the one who paid the tab. (A. 347a-355a.)

Apart from the proof of cash expenditures, evidence was also introduced to show specific sources of income. In a loan application to Bankers Trust Company made in 1968 (II-Tr. 104-105) and again in an insurance claim filed that same year, appellant indicated he was self-employed at the E-Z Floor Wax Company (II-Tr. 120). In an application for a lease filed by appellant in May, 1968, he stated that he was self-employed with income of $125.[3/] (III-Tr. 56.) Hospital admission records for

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2/ "A." references are to the two-volume appendix for defendant-appellant. "I-Tr.", "II-Tr.", "III-Tr.", "IV-Tr.", "V-Tr." and "VI-Tr." references are to the six-volume transcript of the trial.

3/ There was no indication of whether this was weekly or monthly income.

appellant's wife, dated February, 1970, list appellant as the party responsible for the bill and his employment as the "Easy Floor Waxing business owner." (III-Tr. 17-19.) In an insurance application dated April 21, 1971, appellant also listed his employer as the Easy Floor Waxing Company. (III-Tr. 75.)

There was also evidence that appellant had participated in a "loan-sharking" transaction in the spring of 1967. In this particular transaction, appellant loaned Joseph Rabinovich $10,000, charging interest of $250 per week (an annual rate of 130 percent per year). (A439a-441a, 460a.) Rabinovich made eight interest payments of $250 each and then paid off the full $10,000 amount. (A. 441a-457a.) While the payments were made to several individuals (A. 458a), Rabinovich understood that the loan was arranged by appellant (A. 458a-459a). Indeed, Miss Peters testified that appellant had told her that he had made the loan to Rabinovich (A. 415a), that the interest was very high and that he would arrange for another man in Queens to give Rabinovich enough money to take care of the loan (A. 372a-373a, 415a-416a). She further testified that Rabinovich had told her that appellant "came up with the money to his office." (A. 416a.)

In order to establish an appropriate starting point, evidence was introduced to show that appellant had no accumulated assets at the start of the prosecution years (January 1, 1967). This evidence showed that an outstanding judgment for $436.40 entered in 1965 against appellant (A. 166a-174a) could not

be collected (A. 180a, 201a-208a) and that in December, 1966, a 1965 Buick automobile previously purchased by appellant was repossessed (A. 86a). Evidence that appellant had not filed tax returns for 1963, 1964 and 1965 (after having filed a return for 1962 showing a small amount of income) was also allowed on the question of the starting point. (A. 472a-476a.) In addition, the investigation conducted by Special Agent Louis Nahmias failed to turn up any evidence of an accumulation of assets prior to the prosecution years.

Agent Nahmias, testifying over the objections of appellant's counsel,[4/] stated that he had circularized approximately 100 banks, receiving responses from all, and none of them had any accounts or assets in appellant's name. (A. 279a, 324a.) He checked the Clerk's office in Kings County, New York, and could find no record of any real estate in appellant's name. (A. 282a, 315a.) He checked a brokerage house for records of security dealings with negative results. (A. 282a.) He checked with insurance brokers, doctors, schools, hospitals, banks, the phone company, the electric company, appellant's landlords and an automobile dealership in his search for assets and expenditures. (A. 283a-296a.) His investigation turned up most of the witnesses who testified at the trial.

4/ This testimony was admitted for the purpose of negating non-taxable sources of income. (A. 276a-278a.) Much of it also related to the starting point.

Agent Nahmias went outside the State of New York and checked the records of the Probate Clerk in Providence, Rhode Island for possible inheritances.[5/] (A. 291a.) In the course of his search for possible inheritances, the agent also interviewed appellant's sister. (A. 292a.)

As Agent Nahmias had been given no leads, he checked out everything at his disposal concerning sources of income. (A. 280a, 294a-295a.) He tried to find out if appellant was employed and searched for specific items of income--"any kind, any type, whether it be salary or self-employment income." (A. 285a-288a.) As a result of his investigation, he was unable to locate any accumulated assets or sources of nontaxable income.

At the close of the Government's case, appellant moved for a judgment of acquittal and then rested without putting on any evidence. (V-Tr. 164-166.)

SUMMARY OF ARGUMENT

1. Here, in order to prove its case, the Government relied on the cash expenditures method of proof. Under this method of proof it is necessary to show that the taxpayer had not accumulated assets prior to the prosecution years which could have served as a source of the funds expended during the prosecution years and that the funds expended came from income received during the prosecution years.

5/ He was looking for the records of the estates of appellant's mother and father. He was able to locate records for the father but none for the mother. (A. 326a.)

While no one piece of evidence may have been sufficient in itself to prove that appellant had no accumulated assets at the start of the prosecution period, the cumulative evidence, when looked at in toto, clearly sufficed. This evidence included proof that an outstanding judgment against appellant from 1965 was uncollectable and that in 1966, his car was repossessed. In addition, there was proof that he had not filed tax returns for 1963, 1964 and 1965, supporting the inference that he did not have sufficient income in those years to require reporting. Most significant was the testimony by Special Agent Nahmias that his thorough investigation could turn up no accumulation of assets by appellant.

During the time he was conducting his investigation, Agent Nahmias received no leads from appellant. The agent nonetheless checked out everything possible which could have led to a nontaxable source of income. At trial he took the stand and testified in some detail as to the thoroughness of this extensive investigation, the end result of which was that he did not uncover any nontaxable sources of income, thus indirectly establishing that appellant's expenditures were from taxable sources. There was also direct evidence that appellant had derived income from loan-sharking activities.

2. The District Court allowed, with appropriate cautionary instructions, the introduction of evidence that appellant had not filed tax returns for 1963, 1964 and 1965, as evidence that appellant was not accumulating assets during those years. Such evidence is proper when, as here, there is no proof that the taxpayer had income for those years. Indeed, a prior history of nonfiling has long been recognized as one of the accepted methods of proving that a particular taxpayer owned no assets at the starting point in excess of those attributed to him by the Government.

3. The question of the legality of a mail cover used in this case was not raised in the trial court and should not be considered now. There was nothing done here in contravention of appellant's Constitutional rights. Neither statute nor the Constitution prohibit the copying of information contained on the outside of sealed envelopes in the mail so long as there is no substantial delay in delivery involved. In any event, the amount of evidence derived from the mail cover was so insignificant that its use could not have prejudiced appellant or altered the outcome of the case.

4. The District Court's finding that the Government had met its burden of demonstrating that its case was not derived from immunized testimony is not erroneous. The evidence at the hearing on the motion to dismiss established that Agent Nahmias developed his case independent of anything brought out in appellant's testimony before the state grand jury. Indeed,

he did not even know that appellant had been before the grand jury and received no information about or from the grand jury. His investigation followed the one conducted by Special Agent Langone which had been completed and a report written three weeks prior to appellant's first appearance before the grand jury. Nothing concerning appellant's appearance before the Kings County Grand Jury was ever transmitted to federal authorities, at least prior to its being turned over in preparation for the hearing on the motion. There is simply no evidence to support appellant's speculative contention that some of the immunized testimony might have found its way into the Government's case.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO CONVICT (APPELLANT'S ISSUES I AND III)

A. Introduction

Appellant, while giving lip service to the rule of Glasser v. United States, 315 U.S. 60 (1942), that the evidence on appeal must be viewed in the light most favorable to the Government (Br. 19), proceeds throughout both his statement of facts and argument to ignore and/or play down the facts supporting the verdict and emphasize what he asserts are inconsistencies and weaknesses in the Government's case. When his version of the facts is compared with the record, it becomes apparent that he has simply restated his version of the evidence, a version which the jury, by its verdict, rejected. He is, in effect, asking this Court to assess the credibility of the witnesses and to weigh the evidence. But, "it is not for * * * [the courts] to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, supra, p. 80. Even where some of the evidence is conflicting, if there is substantial evidence from which the jury could find guilt beyond a reasonable doubt, the verdict should be sustained. United States v. Cook, 505 F. 2d 659 (C.A. 5, 1974), cert. denied, 43 U.S. Law Week 3636 (Sup. Ct., June 2, 1975).

When the facts outlined above are viewed in the light most favorable to the Government, as they must be at this stage (United States v. Slutsky, 487 F. 2d 832, 835 (C.A. 2, 1973), cert. denied, 416 U.S. 937 (1974)), it is obvious that the evidence was not only sufficient, it was overwhelming. The weight to be given this evidence was properly left in the hands of the jury. United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949).

To place this case in its proper perspective, it must be remembered that this is not a complicated tax evasion case requiring proof of a substantial understatement of income. See e.g., United States v. Slutsky, supra. It is, instead, a rather uncomplicated failure to file case where the Government had only to prove appellant (1) was a person required by law to file returns for the taxable periods--that is, he had an adjusted gross income in excess of $600 for the first three years (1967, 1968 and 1969) and $2,300 for the last two years (1970 and 1971) (see V-Tr. 210-212); (2) that he failed to file returns for these periods; and (3) that this failure to file was willful.[6/] United States v. McCormick, 67 F. 2d 867 (C.A. 2, 1933), cert. denied, 291 U.S. 622 (1934); United States v. McCorkle, 511 F. 2d 482 (C.A. 7, 1975) (en banc), cert. denied, ___ U.S. ___ (Sup. Ct., Oct. 6, 1975).

6/ Appellant does not dispute the fact that he failed to file the tax returns nor does he raise the issue of willfulness. His attack on his conviction focuses on what he asserts was the Government's failure to prove that he had sufficient taxable income to require the filing of returns.

Here, the Government relied on the cash expenditures method of proof. This method is used in situations where the taxpayer has little known assets at the beginning of the prosecution period and envisions that the investigating agent will make a thorough investigation into the financial affairs of the taxpayer so as to be able to testify that he found no evidence that the taxpayer had converted formerly held assets into cash with which to make expenditures during the prosecution years. See United States v. Newman, 468 F. 2d 791 (C.A. 5, 1972), cert. denied, 411 U.S. 905 (1973); United States v. Penosi, 452 F. 2d 217 (C.A. 5, 1972), cert. denied, 405 U.S. 1065 (1972).

While the expenditures method is generally viewed as a variant of the net worth method of proof (see United States v. Newman, supra, p. 793) it is not the same. In United States v. Fisher, 518 F. 2d 836, 841 (C.A. 2, 1975), pet. for cert. filed, 44 U.S. Law Week 3162 (Sup. Ct., Sept. 16, 1975), this Court noted that Taglianetti v. United States, 398 F. 2d 558, 562 (C.A. 1, 1968), distinguished the two methods as follows:

> The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method,

> while effective against taxpayers who channel their income into investment or durable property, is unavailable against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year.

As with the net worth method, the Government, when utilizing the expenditures method, must establish with reasonable certainty an opening net worth or starting point (United States v. Fisher, supra, p. 842) and negate nontaxable sources of income.[7/] United States v. Newman, supra; United States v. Penosi, supra. It is the sufficiency of the Government's proof on the starting point and negation of nontaxable sources of income which appellant challenges here.

B. The starting point

The goal under the expenditures method (which, as noted above, seeks to establish the amount of the taxpayer's purchases of goods and services which are not attributable to the resources on hand at the beginning of the year or to nontaxable receipts during the year) is the showing that the taxpayer

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7/ If, as was done here, the Government proves a likely source of the unreported income, it is not necessary that it also negate nontaxable sources of income. See United States v. Massei, 355 U.S. 595 (1958).

had not accumulated assets prior to the prosecution years which could have served as a source for the funds expended during the prosecution years. The question then is not, as appellant suggests (see, e.g., Br. 14), whether appellant had any assets in 1966 (quite obviously he lived on something for that year), but rather whether he had sufficient assets to carry over into the first prosecution year, 1967. The evidence in this case showed that he did not.

This evidence included proof that an outstanding judgment from 1965 was uncollectable. Appellant asserts (Br. 17) that the collection efforts were "haphazard and aimless." To the contrary, efforts were made by the judgment creditor to collect on the judgment, which included an unsuccessful attempt to locate assets which could be attached. (A. 201a.) Similarly, appellant, conceding that the fact his car was repossessed in December, 1966, "might have been marginally convincing to support the inference that Bianco was unable to pay" (Br. 15), argues that such evidence was offset by other evidence that appellant was able to purchase another car on credit (Br. 16). His arguments on this point, we submit, go merely to the weight to be given the evidence which was properly left in the hands of the jury. Clearly, the jury could reasonably infer from this evidence that appellant was not at that point in time (December, 1966) accumulating assets.

This was not, however, the only evidence rela ve to the starting point. As discussed in Argument II, infra, appellant's failure to file tax returns in 1963, 1964 and 1965 was also probative of the fact that he was not accumulating assets in those years. Appellant, in an effort show that he did have assets available at that time, also points (Br. 20-23) to the testimony by Miss Peters to the effect that he had spent money on her during the fall of 1966. When her testimony is examined in toto, however, it is apparent that the amounts so expended were relatively small. And, in any event, such evidence does not establish an accumulation of assets by appellant during the period and the jury could well have inferred from the Government's evidence that appellant was living in a hand-to-mouth fashion and not accumulating assets.

Probably the most important evidence relative to the starting point, and that which is totally ignored by appellant in this part of his argument, is the testimony by Special Agent Nahmias. This testimony, which is summarized in the statement of the case, supra, detailed the exhaustive investigation conducted by the agent in his search for accumulated assets and nontaxable sources of income. He found none. The agent's investigation was, we submit every bit as thorough as that which was found to be sufficient in United States v. Cook, supra.

In short, when all this evidence and the reasonable inferences derived therefrom is viewed in a light most favorable to the Government, it clearly supports the finding by the jury (which is implicit from its verdict) that appellant had no accumulated assets (i.e., a zero "opening net worth") at the start of the prosecution period.[8/]

C. Negating of nontaxable sources of income

Appellant asserts (Br. 35-37) that the Government did not sufficiently negate the possibility that income could have been derived from nontaxable sources. We disagree. "The government does not have to establish every cipher of receipts and disbursements. It must show a surplus over reported income and

8/ Appellant, asserting (Br. 29) that the Government should have established an opening and closing net worth for each year, has confused the net worth theory with the cash expenditures theory. His reliance on Dupree v. United States, 218 F. 2d 781 (C.A. 5, 1955) is misplaced. In Dupree, the court held that the Government had to show expenditures in excess of the total of the funds available at the beginning of the year and the funds accumulated during the year. This is precisely what was done here. The evidence showed that appellant had no accumulated funds at the start of the first year nor did he accumulate any funds during the prosecution years (see testimony of Agent Nahmias). Therefore, the jury could reasonably infer that the expenditures made during each of the prosecution years must have come from funds acquired during that year.

> In a typical net worth case, as Holland, precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof--as in this case--makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures. Taglianetti v. United States, supra, p. 565.

some sleuthing to explain and find it. Uncle Sam need not, however, be as explicit as Sherlock Holmes was to Watson in recounting the components of the crime." United States v. Newman, supra, p. 795.

The scope and thoroughness of the Internal Revenue Service's investigation is set forth in Agent Nahmias testimony[9/] (A. 275-327a), which is summarized in the statement of the case, supra. The agent received no leads from appellant but nonetheless checked out everything possible which could have led to a nontaxable source of income. (A. 293a-318a.) Appellant contends that the Government did not do enough to negate the possible receipt of an inheritance from appellant's mother or from his wife's parents.[10/] But appellant supplied no leads and it has never been suggested that appellant did in fact receive such an inheritance. Instead, appellant is apparently asking that this Court speculate as to what might have happened. In emphasizing what the agent did not do, he ignores what the agent did.

Upon learning that both of appellant's parents were deceased, Agent Nahmias went to Providence, Rhode Island, where they had resided, and checked the probate records in the Clerk's office. He was able to find the record of the father's estate

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9/ Appellant's counsel continually objected to the admission of the testimony concerning the scope of the investigation. (A. 112-122, 128.) He now contends, in effect, that this testimony was not thorough enough.

10/ Appellant was not even married during the first prosecution year (1967).

but found none for the mother.[11] In addition, the agent interviewed appellant's sister[12] (A. 292a), who most certainly would have known of an inheritance had there been one. There was no need to check the probate records in Kings County, New York,[13] as appellant suggests (Br. 36-37), because the information available indicated that appellant's mother had resided in Rhode Island, not New York.

Appellant also claims (Br. 37) that the Government did not negate the possibility that his wife may have received an inheritance. Again, there has never been any suggestion whatsoever that this was the case. Indeed, nothing even suggests that her parents have died. There was, however, evidence which would suggest that she had not received an inheritance. During 1966 and 1967, she had worked on and off as a hat check girl, a secretary, a cocktail waitress and, finally, as a "bunny" at the Playboy Club in New York City. (VI-Tr. 125-126.) Her tax returns for those years showed a total tax due of $410 for 1966 and $68 in 1967. (A. 481a-487a.)

11/ Under Rhode Island law, if there had been no claim of estate and no claim that the deceased left property it is altogether possible that letters of administration were never issued. See Gendreau v. Radtke, 27 A. 2d 848, 851, 68 R.I. 372, 380 (Sup. Ct. of R.I., 1942). Thus, no record of an estate would exist.

12/ Appellant has conveniently omitted all reference to this significant piece of evidence from his recitation of the facts.

13/ The agent had checked the records in the Kings County Clerk's Office in his search for possible assets held by appellant. (A. 286.)

The critical question is not whether the Government has checked out every remote possibility but rather, whether the investigation has been sufficiently adequate to support the inference that the expenditures were attributable to currently taxable income. We submit that it was. This is particularly true when, as here, the defendant furnished no leads. In such a situation, the Government is not required to make a limitless search for nontaxable income. As the court in Penosi said (452 F. 2d, pp. 220-221):

> Once expenditures are established, the government cannot be expected to conduct an exhaustive nationwide investigation when the defendant supplies no relevant leads as to where he got the money he admittedly spent. See Holland v. United States, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150. Under the circumstances of this case, the government agent did enough to carry the burden of proof when he interviewed friends and relatives and checked with financial and governmental institutions at both the present and former residences of the defendant.
>
> The burden of proving a taxable source remained on the government throughout the trial. But when the results of the investigation were put into evidence, the government established a prima facie case, and by remaining silent, Penosi took the risk that the jury would believe the government's witnesses and find him guilty. As the Supreme Court stated in Holland v. United States, supra, the defendant who remains silent in a prosecution for tax evasion often does so "at his peril":
>
> > "But where the relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant . . . .

> "Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of criminal law are applicable to net worth cases just as to prosecutions for other crimes. Once the Government has established its case, the defendant remains quiet at his peril."

When all the evidence is viewed in its proper context, it becomes clear, we submit, that this evidence, including the extensive but fruitless investigation to uncover any possible sources of nontaxable income, was sufficient to meet the Government's burden of showing that expenditures during the prosecution years were from taxable income in those years.[14/]

14/ In addition, the Government also proved that appellant had a likely source of the unreported income. On several occasions appellant had made statements that he was self-employed during the prosecution years. These statements, made during those years, constituted admissions by him which did not need to be corroborated. Warszower v. United States, 342 U.S. 342 (1941). There was also evidence that appellant engaged in loan-sharking activities which netted him at least $2,000 in 1967 alone. When the Government can establish a likely source of the unreported income, it is not necessary that it also negate all possible sources of nontaxable income. See United States v. Massei, 355 U.S. 595 (1958).

II

THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF APPELLANT'S FAILURE TO FILE TAX RETURNS FOR 1963, 1964 AND 1965 (APPELLANT'S ISSUE II)

In this case, as in many others (see, e.g., Holland v. United States, 348 U.S. 121 (1954); Friedberg v. United States, 348 U.S. 142 (1954); Smith v. United States, 348 U.S. 147 (1954)), the Government relied on appellant's prior history of filing and nonfiling of tax returns for the years prior to the prosecution years as part of its proof that appellant had insufficient income in those years to save or accumulate any appreciable amount of money. In the instant case, this history included evidence that appellant had filed a tax return for 1962 reporting $337.50 in taxable income for that year (IV-Tr. 186-191) and had not filed tax returns for 1963, 1964, 1965 and 1966 (A. 472a-474a). The District Court admitted the 1962 return on the issue of knowledge of the legal duty (IV-Tr. 214-215; A. 515a-516a) and the 1966 evidence of nonfiling on the issue of intent and willfulness (A. 473a-476a; A. 513a-515a)[15/]. The court rejected the Government's proffer that the evidence of

15/ The admissibility of this evidence is not challenged by appellant in this Court. Appellant does state, however, that "there was * * * no means by which the jury could then determine whether the expenditures [for 1966] were made from taxable income or prior accumulations." (Br. 27.) But there was evidence that in a loan application completed by appellant in 1966 he indicated that he was employed at the Sevena Furniture Company. (A. 230a-235a.)

nonfiling in 1963, 1964 and 1965 also was probative on the intent issue, ruling that there was no evidence that appellant had any income in those years. (V-Tr. 6-8.) It was because there was no evidence of income in those years that the court allowed the evidence of nonfiling to come in, with proper cautionary instructions, to be considered by the jury on the issue of whether appellant had accumulated funds prior to 1967. (A. 473a-476a; A. 513a-516a.)

Three circuits have specifically stated that a prior history of nonfiling is admissible as proof that the taxpayer was not accumulating wealth during those years. United States v. Caserta, 199 F. 2d 905, 907, fn. 5 (C.A. 3, 1952); Hanson v. United States, 186 F. 2d 61, 66-67 (C.A. 8, 1950); United States v. Skidmore, 123 F. 2d 604, 610 (C.A. 7, 1941).[16/] Likewise, the Supreme Court in Smith v. United States, supra, gave its stamp of approval to the use of this kind of evidence to show the absence of accumulated funds. The Court stated (348 U.S., p. 157):

> Two significant items of evidence tend to show that petitioner owned no assets at the starting point in excess of those attributed to him in the Government's statement. First, a Government official testified that petitioner had filed no income tax returns in the years 1936 through 1939, nontaxable returns for 1940 and 1942, a nonassessable return for 1943, a refundable

16/ In United States v. Skidmore, supra, the court approved an instruction which told the jury that everyone is presumed to have complied with the provisions of the law and that "evidence that he [taxpayer] did not file a tax return for any of these prior years may therefore be considered by you as an admission by him that he did not have a net income in excess of the amounts for which he would have been required by law to have filed a tax return." (123 F. 2d, p. 610.)

The court in Hanson v. United States, supra, approved an almost identical instruction. (186 F. 2d, pp. 66-67.)

> a refundable return for 1944, and a taxable return for 1941. (Emphasis added.)17/

We submit that there is no qualitative difference between the evidence admitted here and that referred to in Smith. Clearly, it was not an abuse of discretion for the District Court to allow the evidence to go to the jury for its consideration on the issue of whether appellant had accumulated funds prior to 1967. (A. 513a-516a.)

Appellant's reliance (Br. 31-34) on United States v. Schipani, 362 F. 2d 825 (C.A. 2, 1966), vacated and remanded on other grounds, 385 U.S. 372 (1966), is misplaced. In the sentence immediately preceding the one quoted by appellant at page 33 of his brief, this Court explained that "under the circumstances of [that] case" (where the Government's proof established expenditures during the years in which no returns were filed) it was inconsistent for the Government to argue that the defendant there had income for the prosecution years but none for the prior years (362 F. 2d, p. 829). Nowhere did this Court say that the admission of such evidence was reversible error. On the retrial of Schipani, the trial court, in refusing to admit such evidence noted that "such an inference is inconsistent with the factual pattern described below." United States v. Schipani, 293 F. Supp. 156, 157 (E.D. N.Y., 1968). On appeal, this Court held that the trial court had not abused its discretion in

17/ Similar evidence, including evidence of nonfiling, was accepted by the Court in Friedberg v. United States, supra, p.144.

ruling as it did. United States v. Schipani, 414 F. 2d 1262, 1268 (C.A. 2, 1968). In the instant case, the District Court found there was no evidence that appellant had income in 1963, 1964 and 1965[18/] and that it would not, therefore, be inconsistent for the evidence of his nonfiling for those years to go to the jury on the issue of whether he accumulated funds prior to 1967.[19/]

III

THE EVIDENCE DERIVED FROM USE OF A MIAL COVER AND INTRODUCED AT TRIAL WITHOUT OBJECTION SHOULD NOT SERVE AS A BASIS FOR REVERSAL OF APPELLANT'S CONVICTION (APPELLANT'S ISSUE IV)

Appellant raises for the first time on this appeal (Br. 37-42) the question of whether a mail cover utilized in this investigation violated his rights under the Fourth Amendment. He did not object to this evidence at trial, nor was a motion to suppress such evidence ever made either before or during trial. Normally, "the failure to make a proper objection before the

18/ Indeed, the evidence at a pretrial hearing (known, of course, to the trial judge) indicated that an investigation into appellant's failure to file tax returns for 1964, 1965 and 1966 was dropped by the Internal Revenue Service because "they were unable to find enough expenditures on the part of Mr. Bianco to show that he had sufficient income to file returns for those years." (A. 63a.)

19/ Even if we assume arguendo that this was error, we submit that it was harmless. See Brown v. United States, 411 U.S. 223, 231 (1973). This evidence was submitted to the jury for only a limited purpose. While probative for this purpose, it was not critical. As discussed, supra, there was other more significant evidence on the issue of the starting point. The fact that appellant had not been filing tax returns was never seriously disputed and in following the limiting instructions given by the court, the jury would not draw any improper inferences from appellant's failure to file in the preindictment years of 1963, 1964 and 1965. Clearly, this evidence was not so prejudicial as to warrant a reversal here.

the trial court to the admission of the challenged evidence forecloses review of the asserted error." United States v. Indiviglio, 352 F. 2d 276, 277 (C.A. 2, 1965) (en banc), cert. denied, 383 U.S. 907 (1966). Appellant seeks to circumvent this rule by arguing (Br. 41) that the law has changed since the trial of this case. We disagree.

When the excerpt from United States v. Leonard, 75-2 U.S.T.C., par. 9695 (C.A. 2, Aug. 28, 1975), relied upon by appellant (Br. 41-42), is read in context, it is clear, we submit, that nothing in Leonard in any way alters the existing law as set forth in United States v. Costello, 255 F. 2d 876, 881-882 (C.A. 2, 1958), that neither the Constitution nor statute proscribe the copying of information contained on the outside of sealed envelopes in the mail.[20/] The dicta in Leonard (75-2 U.S.T.C., pp. 88,116-88,117) merely points out that perhaps the rule in Costello should not be read as an unqualified absolute. It does not, as appellant intimates, create an exception to that rule. There is nothing in the record in this case to even remotely suggest that the mail cover violated any of appellant's Constitutional rights. In Leonard, this Court noted that "it is difficult to see how there can be any such reasonable expectation [of privacy] with respect to the outside of incoming mails which are subject to inspection and even in

20/ Other courts have reached similar conclusions. Lustigar v. United States, 386 F. 2d 132, 139 (C.A. 9, 1967), cert. denied, 390 U.S. 951 (1968); Cohen v. United States, 378 F. 2d 751, 760 (C.A. 9, 1967); Canaday v. United States, 354 F. 2d 849, 856 (C.A. 8, 1966); United States v. Schwartz, 283 F. 2d 107 (C.A. 3, 1960), cert. denied, 364 U.S. 942 (1961).

some cases to opening in aid of the enforcement of the customs laws" (75-2 U.S.T.C., p. 88,117). Similarly, in the case of domestic mails, there can be little expectation of privacy as to matters on the outsides of the mails as such material is subject to handling by innumerable persons (both private and governmental) who maintain no confidential relationship with the addressee. Having failed to raise the issue in the trial court, appellant should not, we submit, be permitted to pursue it here. United States v. Indiviglio, supra.

Even if this Court were to consider appellant's claim, the impact of the evidence derived from the mail cover was so insignificant that its admission without objection could not rise to the level of plain error under Rule 52(b), Federal Rules of Criminal Procedure, sufficient to require a reversal here. The only item which definitely came from the mail cover was a $225 item in the 1971 year. (A. 323a; III-Tr. 100.) Other items which might have come from the mail cover totalled slightly more for the years 1968 through 1971.[21/] (A. 319a-323a, 491a-492a; III-Tr. 78-79, IV-Tr. 240-246.)

When all the evidence which was, or might have been, derived from the mail cover is taken out of the case, the reduction in the adjusted gross income for each year is minimal.

21/ Indeed, the mail cover led investigators to two items which inured to appellant's favor. The first, a $1,750 reimbursement by an insurance company reduced an $1,800 expenditure in 1968 to $50. (A. 491a; III-Tr. 3.) The second, a $3,000 payment from the same insurance company in 1969, reduced appellant's adjusted gross income for that year by almost one-third. (A. 492a.)

Year	Adjusted Gross Income	Amount Possibly Derived From Mail Cover	Adjusted Gross Income Without Evidence From Mail Cover	Percent Reduction
1967	$ 4,284.68	$ 0	$4,284.68	None
1968	5,924.99	348	5,576.99	8.12%
1969	6,898.25	519	6,379.25	8.26
1970	8,916.49	599	8,317.49	6.72
1971	10,217.01	565	9,652.01	5.53

Keeping in mind that the Government only had to prove income in excess of $600 for each of the first three years and $2,300 for each of the last two, it becomes obvious that the amounts involved, even if excluded from the case, would not have altered the outcome.

IV

THE DISTRICT COURT'S FINDING THAT THE GOVERNMENT HAD MET ITS BURDEN OF DEMONSTRATING THAT ITS CASE WAS NOT DERIVED FROM IMMUNIZED TESTIMONY IS SUPPORTED BY THE EVIDENCE AND NOT CLEARLY ERRONEOUS
(APPELLANT'S ISSUE V)

Appellant's final argument (Br. 43-57) attacks the District Court's finding that none of the evidence used in this case was derived from prior state grand jury testimony by appellant given under a grant of immunity. This finding is, we submit, fully supported by the evidence and not clearly erroneous.[22/]

In this case, as with all cases where the Government brings charges against an individual who has previously testified under a grant of immunity, the Government has the affirmative duty of proving that the evidence it intends to use was not derived from the compelled testimony. Kastigar v. United States, 406 U.S. 441 (1972); United States v. Catalano, 491 F. 2d 268 (C.A. 2, 1974), cert. denied, 419 U.S. 825 (1974). While this may indeed be a "heavy burden," it is not an impossible one. The Government met its burden here by showing an independent investigation which did not involve the use of immunized testimony.

22/ Since the District Court's ruling involves a finding of fact, it should not be set aside unless clearly erroneous. United States v. Garcilaso de la Vega, 489 F. 2d 761, 763 (C.A. 2, 1974).

See United States v. First Western State Bank of Minot, N.D., 491 F. 2d 780, 783-788 (C.A. 8, 1974), cert. denied sub nom. Thompson v. United States, 419 U.S. 825 (1974). A grant of immunity affords no broader protection than the Fifth Amendment privilege. United States v. DeDiego, 511 F. 2d 818, 822 (C.A. D.C., 1975).[23] It follows, therefore, that proof by the preponderance of the evidence will satisfy the Government's burden. Lego v. Twomey, 404 U.S. 477, 487-489 (1972); cf., United States v. Cales, 493 F. 2d 1215 (C.A. 9, 1974).[24]

Appellant, by quoting out of context parts of the record and ignoring the rest, has painted a distorted picture of the true facts. The hearings on the motion to dismiss the indictment, which lasted for parts of three days (A. 45a-160a), produced

23/ Appellant, relying on the dissent in DeDiego (Br. 55-56), disposes of the majority opinion in cavalier fashion with the comment (Br. 55) that "the majority opinion only peripherally skirted the immunity problem." We submit that the majority opinion cannot be so easily ignored.

24/ We submit that the burden imposed on the Government to prove an absence of taint from the immunized testimony is no different than the burden shouldered by the Government in cases where evidence was obtained in violation of a defendant's Fourth or Fifth Amendment rights. In both cases the Government must show by a preponderance of the evidence that the evidence it intends to use at trial was not "tainted." See, e.g., United States v. Cales, supra; United States v. Falley, 489 F. 2d 33, 40-41 (C.A. 2, 1973); United States v. Cole, 463 F. 2d 163, 171-174 (C.A. 2, 1972), cert. denied, 409 U.S. 942 (1972); United States v. Friedland, 441 F. 2d 855, 856-861 (C.A. 2, 1971), cert. denied, 404 U.S. 867 (1971).

ample evidence from which the District Court could reasonably conclude that the Government's case was comprised of evidence derived from sources wholly independent of appellant's testimony before the state grand jury.

Special Agent Nahmias testified at length about his investigation and his lack of contact with state officials who had been involved with the grand jury proceedings. (A. 48a-134a.) He stated that he did not even know that appellant had appeared before the Kings County Grand Jury until just prior to the hearing on the motion when he was apprised of the fact by the Government attorney. (A. 49a, 127a.) He received no information from anyone connected with the Kings County District Attorney's office and had never seen the grand jury minutes. (A. 50a, 72a, 113a, 121a, 127a.) The Internal Revenue Service's investigation of appellant had begun long before his appearance before the state grand jury.[25/] Indeed, this earlier investigation of appellant's failure to file tax returns for 1964, 1965 and 1966 was dropped because of insufficient proof of expenditures for those years.[26/] (A. 63a.) The two sources of income used in this case (i.e.,

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25/ The report of this investigation written by Special Agent Langone (defendant's Exhibit A at the motion to dismiss) is dated March 5, 1970 (A. 54a-55a), some three weeks prior to appellant's first appearance before the grand jury. Agent Nahmias used this report together with information from Revenue Agent Smith as the basis for his investigation. (A. 55a-56a, 60a.)

26/ At trial it was disclosed that the Internal Revenue Service had asked for a mail watch on appellant's house as early as 1962. (A. 318a.)

the E-Z Floor Wax Company (which appellant listed on-loan applications, hospital admission documents and the like) and the loan-sharking transaction) were discovered by the agent in the course of his independent investigation. (A. 60a, 71a-72a, 133a.) The District Court specifically noted that the "shylocking did come from another source. It didn't appear to come from any grand jury." (A. 133a.) The agent further testified that he had never used gambling as a source of income (A. 103a) and that the reference to gambling in the special agent's report came from the criminal records at the police department (A. 73a-74a, 104a).[27/]

Former Assistant District Attorney David Katz testified that while an assistant in the Kings County District Attorney's office, he had handled appellant's appearances before the Kings County Grand Jury in the spring of 1970. (A. 140a.) Testifying from his best recollection, he stated that he had not discussed appellant's testimony with anyone from the Internal Revenue Service, the United States Attorney's office or the Federal Bureau of Investigation. (A. 140a-143a.) As far as he knew, he had never discussed the testimony with anyone outside of his supervisor or another Assistant District Attorney who had been working with him on the case. (A. 154a.)

27/ References to gambling had been made in appellant's appearances before the grand jury. (A. 20a-22a, 32a.)

During the course of the hearings, appellant's counsel requested (A. 83a) and received (A. 159a) additional discovery. At the conclusion of the hearing, counsel candidly stated that "we have not been able to produce any affirmative evidence that the information that the Government has come from the Brooklyn District Attorney's office at this time." (A. 159a.) Counsel also asked for any reports that may have been made in the Kings County District Attorney's office and indicated that he might contact Detective Capabianco[28/] of the District Attorney's office.[29/] The Assistant United States Attorney then suggested that he write a letter to the Kings County District Attorney's office requesting the information sought, and then advise the court and defense counsel of any response. (A. 158a-159a.) By letter dated December 10, 1974 (Appendix A, infra), the Government attorney asked the Kings County District Attorney to supply the requested information. By letter of December 19, 1974 (Appendix B, infra), the Government attorney advised the court and appellant's counsel that the District Attorney's office had advised that they had no reports relative to the grand jury proceedings. In this letter Mr. McCaffrey further stated "Detective Capobianco called the same day. He stated that he did not give any information concerning the Bianco Grand Jury proceedings to any Federal agency. Mr. Capabianco

28/ Detective Capabianco was a local police officer who was working on the investigation.

29/ "Mr. LaRossa: I think I would like a short time in which to make that determination and possibly seek him out myself and if I find it to be fruitless I will then inform the Court I am desirous of bringing him back." (A. 158a.)

stated that he is available if his testimony is required." (Appendix B, infra.) Apparently, appellant's counsel was satisfied with this response, for he never asked for this testimony.[30/]

Here, the case agent testified that he had no access to any of the grand jury information. Former Assistant District Attorney Katz testified that he did not give any information to the federal authorities. The grand jury transcripts were made a part of the record, and examined by both the court and appellant's counsel. In addition, appellant was given virtually complete discovery of the Government case. (A. 159a-160a.) Out of all of this there is no proof that any evidence utilized by the Government was derived from the immunized testimony. To the contrary, this evidence reasonably supports the conclusion that none of the evidence was derived from the immunized testimony and that the Government had, as the District Court found, sustained its burden. See United States v. First Western State Bank of Minot, N.D., supra, p. 787.

Appellant also argues (Br. 53-56) that because the prosecutor read the grand jury minutes he could not obliterate this information from his mind. Again, he has raised an issue in this Court which was not raised below. In any event, there

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30/ Appellant does, however, now suggest (Br. 49) that Detective Capabianco should have been called as a witness. We submit that he should not be allowed to remain silent after receipt of the letter, and then come to this Court suggesting that maybe the detective had passed along some information and that the Government should have gone further to negate this speculative possibility.

is no evidence that his reading of the grand jury minutes in any way tainted this case.[31] This is not the situation found to exist in United States v. McDaniel, 482 F. 2d 305 (C.A. 8, 1973) where the prosecutor reviewed three volumes of self-incriminating testimony, nor even that confronted by this Court in United States v. Catalano, supra. Here, all evidence which was used at trial and also referred to in the grand jury minutes minutes was shown to have originated from the independent investigation conducted by the Internal Revenue Service. See United States v. Catalano, supra, p. 272. Reading the grand jury minutes at this stage could not have possibly aided the prosecutor since the information revealed by the challenged testimony (Br. 44-46) was already known to the prosecutor. Appellant's argument, while strong on speculation, is deficient of any showing of how the District Court's ruling is clearly erroneous. Absent such a showing that ruling should not be reversed.[32]

31/ It was, of course, proper and necessary that he review the grand jury minutes in order to fully discharge his responsibilities at the motion to dismiss.

32/ None of the claimed errors in this case could possibly have affected the substantial rights of the appellant. "'[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.'" Brown v. United States, 411 U.S. 223, 231-232 (1973). Appellant received a fair trial.

CONCLUSION

For the reasons stated, the judgment of conviction should be affirmed.

Respectfully submitted,

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
ROBERT E. LINDSAY,
CHARLES E. BROOKHART,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:

DAVID G. TRAGER,
United States Attorney.

OCTOBER, 1975.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing four copies thereof on this 16th day of October, 1975, in an envelope, with postage prepaid, properly addressed to them as follows:

James M. LaRossa, Esquire
Gerald L. Shargel, Esquire
LaRossa, Shargel & Fischetti
522 Fifth Avenue
New York, New York 10036

Gilbert E. Andrews/emk
GILBERT E. ANDREWS,
Attorney.

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

Organized Crime Section
Criminal Division
Federal Building
35 Tillary Street
Room 327-A
Brooklyn, New York 11201
December 10, 1974

Honorable Eugene Gold
District Attorney of Kings County
Municipal Building
Brooklyn, New York 11201

RE: United States v. Nicholas L. Bianco, 74 CR 284

Dear Mr. Gold:

Nicholas L. Bianco has been charged in the Eastern District of New York with failure to file income tax returns for the years 1967, 1968, 1969, 1970 and 1971, in violation of Title 26, United States Code, Section 7203.

A hearing has been in progress before Honorable Thomas C. Platt, United States District Judge, to determine among other things whether or not the Federal charges against Bianco were based on testimony given by him before a Kings County Grand Jury under a grant of immunity.

In accordance with our earlier request, you furnished us with transcripts of Bianco's Grand Jury testimony. David Katz, a former Assistant District Attorney in your office, who conducted the Grand Jury proceedings, has testified as a Government witness.

A question has now been raised by defense counsel as to whether Detective Capobianca of your office prepared any background or other reports concerning Nicholas Bianco, which were furnished to Mr. Katz prior to the Grand Jury proceedings. Judge Platt has directed the undersigned to make this inquiry. Will you kindly advise us whether or not there are any such reports. If there are any, will you make them available to Judge Platt for in camera inspection.

A question has also been raised as to whether or not Detective Capobianca transmitted any information concerning Bianco's Grand Jury testimony to any Federal investigative agent. It would be appreciated if Detective Capobianca would call the undersigned at 596-3564 concerning this.

Your past cooperation in this matter is greatly appreciated.

Very truly yours,

Donald F. Mc Caffrey
Special Attorney

cc: Honorable Thomas C. Platt
United States District Judge
Eastern District of New York

James La Rossa, Esq.
522 Fifth Avenue
New York, New York 10036

DFM:gak

APPENDIX B

Organized Crime Section
Criminal Division
Federal Bureau
35 Tillary Street
Room 327-A
Brooklyn, New York 11201
December 19, 1974

Honorable Thomas C. Platt
United States District Judge
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

RE: United States v. Nicholas L. Minuto, 74 Cr. 634

Dear Judge Platt:

On December 10, 1974, we sent a letter to the Kings County District Attorney of Kings County inquiring whether or not Detective Capobianco received any background or other material which he furnished to the F.B.I. with regard to the Kings County Grand Jury proceedings.

Mr. Joseph Hines of the Kings County District Attorney's Office called the undersigned on December 13 and advised that their office has no such reports.

Detective Capobianco called the same day. He stated that he did not give any information concerning the Kings Grand Jury proceedings to any Federal agency. Mr. Capobianco stated that he is available if his testimony is required.

Very truly yours,

Donald F. McGaffrey
Special Attorney

DFM:gak

cc: James La Rossa, Esq.
522 Fifth Avenue
New York, New York 10036

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

October 16, 1975

SPC:GEA:CEBrookhart:vf
5-52-12605

A. Daniel Fusaro, Esquire
Clerk, U.S. Court of Appeals
for the Second Circuit
Room 1702, U.S. Courthouse
Foley Square
New York, New York 10007

Re: United States v. Nicholas L. Bianco
(C.A. 2 - No. 75-1244)

Dear Mr. Fusaro:

We are transmitting herewith for filing with your Court twenty-five copies of the brief on behalf of the Appellee in the above-entitled case.

We are forwarding four additional copies to counsel for the Appellant, together with a copy of this letter.

Sincerely yours,

SCOTT P. CRAMPTON
Assistant Attorney General
Tax Division

By: Gilbert E. Andrews/ssk

GILBERT E. ANDREWS
Chief, Appellate Section

Enclosures

cc: James M. LaRossa, Esquire
Gerald L. Shargel, Esquire
LaRossa, Shargel & Fischetti
522 Fifth Avenue
New York, New York 10036

United States Attorney
Brooklyn, New York 11201